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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 ALEXIS SANTOS,

7 Plaintiff,

8 v.

9 CAROLYN W. COLVIN, Commissioner of
10 Social Security,

11 Defendant.

Case No. 3:12-cv-05827-KLS

ORDER GRANTING PLAINTIFF'S
APPLICATION FOR ATTORNEY FEES,
COSTS AND OTHER EXPENSES
PURSUANT TO 28 U.S.C. § 2412

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13 Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR
14 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge.
15 This matter comes before the Court on plaintiff's filing of an application for attorney fees, costs
16 and other expenses pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. See
17 ECF #17. After reviewing plaintiff's application, defendant's response to that application,
18 plaintiff's reply thereto, and the remaining record, the Court finds that for the reasons set forth
19 below plaintiff's application should be granted.
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21 FACTUAL AND PROCEDURAL HISTORY
22

23 On September 13, 2012, plaintiff filed a complaint in this Court seeking judicial review
24 of defendant's decision to deny his application for disability insurance benefits. See ECF #1. In
25 his opening brief, plaintiff argued defendant's decision should be reversed and remand for an
26 award of benefits, or in the alternative for further administrative proceedings, because the ALJ

1 erred:

- 2 (1) in finding plaintiff's hypertension and sleep apnea were not severe
3 impairments;
- 4 (2) in evaluating the opinions of Gary Gaffield, D.O., James Parker, M.D.,
5 and Kristine S. Harrison, Psy.D.;
- 6 (3) in discounting plaintiff's credibility;
- 7 (4) in failing to adopt all of the mental limitations found by Michael L.
8 Brown, Ph.D., Patricia Kraft, Ph.D., and Leslie Postovoit, Ph.D., in
9 assessing plaintiff's residual functional capacity ("RFC");
- 10 (5) in failing to resolve the inconsistency between the vocational
11 expert's testimony identifying the jobs of laundry worker, warehouse
12 laborer, mailroom clerk, and office helper that could be performed and
13 the descriptions of those jobs contained in the Dictionary of Occupational
14 Titles with respect to the limitation to simple, repetitive work assessed by
15 the ALJ; and
- 16 (6) in failing to consider the vocational impact of the need to accommodate
17 plaintiff's use of a service dog.

18 See ECF #15; see also ECF #12. On September 12, 2013, the Court issued an order reversing
19 and remanding defendant's decision to deny benefits for further administrative proceedings,
20 agreeing that the ALJ erred: (a) by failing to properly take into consideration all of the mental
21 limitations found by Drs. Brown, Kraft and Postovoit in assessing plaintiff's RFC; (b) by failing
22 to properly consider the vocational impact of plaintiff's use of a service dog; and (c) in finding
23 plaintiff to be capable of performing the job of mailroom clerk. See ECF #15.

24 On December 10, 2013, plaintiff filed her application for attorney fees, costs and
25 expenses pursuant to the EAJA, requesting attorney fees in the amount of \$6,377.00, costs in the
26 amount of \$350.00 and other expenses in the amount of \$17.85. See ECF #17. On December 23,
2013, defendant filed her response to plaintiff's application, arguing plaintiff's application
should be denied on the basis that the government's position was substantially justified. See ECF

#20. As plaintiff has filed her reply to defendant's response (see ECF #21), plaintiff's application is now ripe for the Court's review.

DISCUSSION

The EAJA provides in relevant part:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). Thus, to be eligible for attorney fees under the EAJA: (1) the claimant must be a "prevailing party"; (2) the government's position must not have been "substantially justified"; and (3) no "special circumstances" exist that make an award of attorney fees unjust. Commissioner, Immigration and Naturalization Service v. Jean, 496 U.S. 154, 158 (1990).

In Social Security disability cases, "[a] plaintiff who obtains a sentence four remand is considered a prevailing party for purposes of attorneys' fees." Akopyan v. Barnhart, 296 F.3d 852, 854 (9th Cir. 2002) (citing Shalala v. Schaefer, 509 U.S. 292, 301-02 (1993)).¹ Such a

¹ Section 405(g) of Title 42 of the United States Code "authorizes district courts to review administrative decisions in Social Security benefit cases." Id., 296 F.3d at 854. Sentence four and sentence six of Section 405(g) "set forth the exclusive methods by which district courts may remand [a case] to the Commissioner." Id. "The fourth sentence of § 405(g) authorizes a court to enter 'a judgment affirming, modifying, or reversing the decision of the [Commissioner], with or without remanding the cause for a rehearing.'" Melkonyan v. Sullivan, 501 U.S. 89, 98 (1991); see also Akopyan, 296 F.3d at 854 (sentence four remand is "essentially a determination that the agency erred in some respect in reaching a decision to deny benefits.") A remand under sentence four thus "becomes a final judgment, for purposes of attorneys' fees claims brought pursuant to the EAJA, 28 U.S.C. § 2412(d), upon expiration of the time for appeal." Akopyan, 296 F.3d at 854. A sentence six remand, on the other hand, "may be ordered in only two situations: where the Commissioner requests a remand before answering the complaint, or where new, material evidence is adduced that was for good cause not presented before the agency." Id. Accordingly, "[u]nlike sentence four remands, sentence six remands do not constitute final judgments." Id. at 855. Instead, "[i]n sentence six cases, the filing period [for motions for EAJA attorney's fees] does not begin until after

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1 plaintiff is considered a prevailing party even when the case is remanded for further
2 administrative proceedings. Id. There is no issue here as to whether plaintiff is a prevailing party
3 given that as discussed above, defendant's decision to deny benefits was reversed and this case
4 was remanded for further administrative proceedings. In addition, defendant does not argue that
5 the amount of attorney fees, costs and other expenses are unreasonable or that there are special
6 circumstances making an award of attorney's fees unjust.

7
8 I. Substantial Justification

9 As noted above, to be entitled to attorney fees under the EAJA, defendant's position must
10 not be "substantially justified." Jean, 496 U.S. at 158. Normally, for defendant's position to be
11 "substantially justified," this requires an inquiry into whether defendant's conduct was "'justified
12 in substance or in the main' – that is, justified to a degree that could satisfy a reasonable person"
13 – and "had a 'reasonable basis both in law and fact.'" Gutierrez v. Barnhart, 274 F.3d 1255, 1258
14 (9th Cir. 2001) (quoting Pierce v. Underwood, 487 U.S. 552, 565 (1988)); Penrod v. Apfel, 54
15 F.Supp.2d 961, 964 (D. Ariz. 1999) (citing Pierce, 487 U.S. at 565); see also Jean, 496 U.S. at
16 158 n.6; Flores v. Shalala, 49 F.3d 562, 569-70 (9th Cir. 1995). As such, this "does not mean
17 'justified to a high degree.'" Corbin v. Apfel, 149 F.3d 1051, 1052 (9th Cir. 1998) (quoting
18 Pierce, 487 U.S. at 565). On the other hand, "the test" for substantial justification "must be more
19 than mere reasonableness." Kali v. Bowen, 854 F.2d 329, 331 (9th Cir. 1988).

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21 Defendant has the burden of establishing substantial justification. See Gutierrez, 274 F.3d
22 at 1258. Defendant's position must be "*as a whole*, substantially justified." Gutierrez, 274 F.3d
23 at 1258-59 (emphasis in original). That position also "must be 'substantially justified' at 'each
24 stage of the proceedings.'" Corbin, 149 F.3d at 1052 ("Whether the claimant is ultimately found

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26 the postremand proceedings are completed, the Commissioner returns to court, the court enters a final judgment, and
the appeal period runs." Id. (citing Melkonyan, 501 U.S. at 102).

1 to be disabled or not, the government’s position at each [discrete] stage [in question] must be
2 ‘substantially justified.’”) (citations omitted); see also Hardisty v. Astrue, 592 F.3d 1072, 1078
3 (9th Cir. 2010) (“[D]istrict courts should focus on whether the government’s position on the
4 particular issue on which the claimant earned remand was substantially justified, not on whether
5 the government’s ultimate disability determination was substantially justified.”). Accordingly,
6 the government must establish that it was substantially justified both in terms of “the underlying
7 conduct of the ALJ” and that “its litigation position defending the ALJ’s error.” Gutierrez, 274
8 F.3d at 1259. As the Ninth Circuit further explained:

10 The plain language of the EAJA states that the “‘position of the United States’
11 means, in addition to the position taken by the United States in the civil
12 action, the action or failure to act by the agency upon which the civil action is
13 based.” 28 U.S.C. § 2412(d)(2)(D); *Jean*, 496 U.S. at 159, 110 S.Ct. 2316
14 (explaining that the “position” relevant to the inquiry “may encompass both
15 the agency’s prelitigation conduct and the [agency’s] subsequent litigation
16 positions”). Thus we “must focus on two questions: first, whether the
government was substantially justified in taking its original action; and,
second, whether the government was substantially justified in defending the
validity of the action in court.” *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir.
1988).

17 Id.; see also Kali, 854 F.2d at 332 (noting government’s position is analyzed under “totality of
18 the circumstances” test)²; Thomas v. Peterson, 841 F.2d 332, 334-35 (9th Cir. 1988). Indeed, the
19 Ninth Circuit has explicitly stated that “[i]t is difficult to imagine any circumstance in which the
20 government’s decision to defend its actions in court would be substantially justified, but the
21 underlying decision would not.” Sampson, 103 F.3d at 922 (quoting Flores, 49 F.3d at 570 n.11).

23 The EAJA creates “a presumption that fees will be awarded unless the government’s
24 position was substantially justified.” Thomas, 841 F.2d at 335; see also Flores, 49 F.3d at 569

26 ² As the Ninth Circuit put it in a later case: “[i]n evaluating the government’s position to determine whether it was
substantially justified, we look to the record of both the underlying government conduct at issue and the totality of
circumstances present before and during litigation.” Sampson v. Chater, 103 F.3d 918, 921 (9th Cir. 1996).

1 (noting that as prevailing party, plaintiff was entitled to attorney's fees unless government could
2 show its position in regard to issue on which court based its remand was substantially justified).
3 Further, while "[t]he government's failure to prevail does not raise a presumption that its
4 position was not substantially justified," a district court's "holding that the agency's decision . . .
5 was unsupported by substantial evidence is . . . a strong indication that the 'position of the United
6 States' . . . was not substantially justified." Meier v. Colvin, 727 F.3d 867, 872 (9th Cir. 2012)
7 (quoting Thangaraja v. Gonzales, 428 F.3d 870, 874 (9th Cir. 2005) ("[I]t will be only a
8 'decidedly unusual case in which there is substantial justification under the EAJA even though
9 the agency's decision was reversed as lacking in reasonable, substantial and probative evidence
10 in the record.'") (citation omitted)); Kali, 854 F.2d at 332, 334; Thomas, 841 F.2d at 335.³
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13 ³ Although defendant notes the Ninth Circuit's holding in Meier, she cites Campbell v. Astrue, 736 F.3d 867 (9th
14 Cir. 2013), for the proposition that "[b]ecause reasonable minds can disagree about whether substantial evidence
15 supports an agency's decision, the government's position can be substantially justified even if the court has found it
16 was not supported by substantial evidence." ECF #20, p. 2. It is true that the Ninth Circuit in Campbell did find the
17 government's position to be substantially justified even though the ALJ in that case "failed to offer specific reasons
18 supported by substantial evidence for rejecting a treating physician's opinion." 736 F.3d at 868-69. However, the
19 Court of Appeals clearly noted the limited nature of its holding in that case:

17 The dissent acknowledges that "in *Meier*, the question was whether the applicant was
18 presently disabled, whereas here, the question was whether Campbell was disabled on the last
19 date insured." Dissent at 870. While this circuit has been clear that when an agency's decision
20 is unsupported by substantial evidence it is a strong indication that the position of the United
21 States is not substantially justified, this circuit has never stated that *every* time this court
22 reverses and remands the ALJ's decision for lack of substantial evidence the claimant should
23 be awarded attorney's fees.

21 The difference between examining current medical records to make a decision about a present
22 condition and extrapolating from medical records to make a decision about a past condition
23 distinguishes this case from *Meier*. The instant case is one of the "unusual" cases where
24 attorneys' fees should not be awarded under the EAJA. In this case there was not enough
25 evidence to uphold a decision, but enough to find the government's position was substantially
26 justified.

24 736 F.3d at 869 (emphasis in original). In further distinguishing the facts in Campbell from those in Meier, the
25 Ninth Circuit noted:

25 While *Meier* and the instant case are similar, in *Meier*, the claimant relied on his own
26 testimony, and a physician's testimony, that he was *presently* disabled. Here, the ALJ had to
determine whether Campbell was disabled in the past. In this case, the ALJ had to determine
whether Campbell's multiple sclerosis rendered her disabled by June 30, 1996. The ALJ did
not have any records from 1996 to examine. Instead, the ALJ had medical records from 1989

1 Defendant argues the government was substantially justified in defending the errors the
2 Court found the ALJ committed, because the issues upon which this matter was reversed and
3 remanded had a reasonable basis in both law and fact. The Court disagrees. Substantial
4 justification will not be found where the government defends “on appeal . . . ‘basic and
5 fundamental’ procedural mistakes made by the ALJ.” Lewis v. Barnhart, 281 F.3d 1081, 1085
6 (9th Cir. 2002) (quoting Corbin, 149 F.3d at 1053). In Corbin, the Ninth Circuit found “the
7 failure to make [specific] findings” and “weigh evidence” to be “serious” procedural errors,
8 making it “difficult to justify” the government’s position on appeal in that case. Corbin, 149 F.3d
9 at 1053. In Shafer v. Astrue, 518 F.3d 1067, 1072 (9th Cir. 2008), the Ninth Circuit found the
10 ALJ “committed the same fundamental procedural errors” noted in Corbin in failing “to provide
11 clear and convincing reasons for discrediting [the claimant’s] subjective complaints,” and “to
12 make any findings regarding” the diagnosis of a non-examining medical expert. The Court of
13 Appeals went on to find the ALJ committed additional procedural errors not present in Corbin,
14 including rejecting “a treating physician’s opinion in favor of a non-treating physician’s opinion
15 without providing clear and convincing reasons.” Id.

16 The errors committed by the ALJ in this case are of a similar nature to those pointed out
17 in Corbin and Shafer. In reversing and remanding this matter, the Court noted that the ALJ had
18 failed to properly consider all of the mental functional limitations found by Drs. Brown, Kraft
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22 and 2000. The ALJ also had to consider circumstantial evidence that Campbell cared for her
23 children and worked during that time, which justified doubts that Campbell was fully
24 disabled. While the ALJ erred in her determination, the fact that she was trying to extrapolate
25 what Campbell’s injury may have been in 1996 from other evidence regarding a disease
which may worsen at varying rates leads this court to conclude that the ALJ’s decision was
“substantially justified.”

26 Id. at 868-69 (emphasis in original). The factual situation in this case, though, is much more like the situation the
Ninth Circuit faced in Meier than it did in Campbell, and therefore the type of “unusual” case Campbell presented,
thereby warranting a finding of substantial justification, is not present here.

1 and Postovoit, including her failure to address at all the need to adjust to well introduced changes
2 assessed by the latter two psychologists. See ECF #15, p. 6. Nor did the ALJ properly take into
3 account the vocationally relevant evidence concerning the need for a service dog, which
4 potentially could preclude all three jobs identified by the vocational expert. Lastly, the record
5 showed that given the ALJ's own RFC assessment one of those jobs would be eliminated due to
6 its required reasoning level. See id. at p. 10, n.4. Such failure to provide specific and legitimate
7 reasons for rejecting the above evidence is the type of "basic and fundamental" error that makes
8 it difficult to justify substantial justification on the government's part in this case. Lewis, 281
9 F.3d at 1085; Corbin, 149 F.3d at 1053; see also Shafer, 518 F.3d at 1072. The Court, therefore,
10 declines to find defendant's position to be substantially justified here.


11 CONCLUSION

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13 For all of the foregoing reasons, plaintiff's application for attorney's fees, costs and
14 expenses pursuant to the EAJA (see ECF #17) hereby is GRANTED. Plaintiff is awarded
15 attorney's fees in the amount of \$6,377, costs in the amount of \$350.00, and other expenses in
16 the amount of \$17.85, to be paid in the following manner:

- 17 (1) Subject to any offset allowed under the Treasury Offset Program, as discussed in
18 Astrue v. Ratliff, 130 S. Ct. 2521, 560 U.S. ____ (2010), payment of this award shall
19 be sent to plaintiff's attorney.
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- 21 (2) After the Court issues this Order, defendant will consider the matter of plaintiff's
22 assignment of EAJA fees and expenses to plaintiff's attorney. Pursuant to Astrue v.
23 Ratliff, the ability to honor the assignment will depend on whether the EAJA fees
24 and expenses are subject to any offset allowed under the Treasury Offset Program.
25 Defendant agrees to contact the Department of Treasury after this Order is entered to
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1 determine whether the EAJA attorney fees and expenses are subject to any offset. If
2 the EAJA attorney fees and expenses are not subject to any offset, those fees and
3 expenses will be paid directly to plaintiff's attorney.

4 DATED this 9th day of January, 2014.

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8 Karen L. Strombom
9 United States Magistrate Judge
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